U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0272 BLA

JIMMIE DALE MAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PREMIER ELKHORN COAL COMPANY	)	
	)	
and	)	
	)	
GATLIFF COAL COMPANY c/o HEALTHMART CCS	)	DATE ISSUED: 02/23/2017
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Joseph A. Wolfe, Brad A. Austin, and M. Rachel Wolfe (Wolfe Williams and Reynolds), Norton, Virginia, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird), Pikeville, Kentucky, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2011-BLA-05999) of Administrative Law Judge Larry W. Price awarding benefits on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on June 1, 2009.[1]

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with thirty-two years of qualifying coal mine employment,[3] and found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the rebuttable presumption that he is totally disabled due to pneumoconiosis.[4] Finally, the administrative law judge determined that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[5]

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[1] Claimant's previous claims, filed on March 10, 1993 and October 17, 2007, were finally denied by the district director because claimant failed to establish any element of entitlement. Director's Exhibits 1, 2.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the claimant establishes fifteen or more years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 7. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] Because the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant invoked the Section 411(c)(4) presumption, and that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[6] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

In evaluating whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Broudy and Rosenberg that claimant does not suffer from legal pneumoconiosis. Employer's Exhibits 6-9, 12-14, 22. Dr. Broudy opined that claimant suffers from chronic obstructive pulmonary disease (COPD) due to smoking. Employer's Exhibits 8, 9 at 11-12. Dr. Rosenberg opined that claimant's disabling air flow obstruction was not caused by his coal mine dust exposure. Director's Exhibit 14; Employer's Exhibit 13.

The administrative law judge noted that Drs. Broudy and Rosenberg relied, in part, on the partial reversibility of claimant's impairment after bronchodilator administration to determine that coal mine dust exposure was not a cause of claimant's obstructive impairment. Decision and Order at 16. The administrative law judge accorded less weight to their opinions because he found that neither physician adequately explained why the irreversible portion of claimant's obstructive pulmonary impairment[7] was not

[6] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[7] As the administrative law judge accurately noted, each of the four pulmonary function studies of record produced qualifying results both before and after the administration of a bronchodilator. Decision and Order at 4; Director's Exhibit 12; Claimant's Exhibit 3; Employer's Exhibits 6, 8.

due, in part, to coal mine dust exposure. *Id.* The administrative law judge also discredited the opinions of Drs. Broudy and Rosenberg because he found that the doctors failed to adequately explain how they eliminated claimant's thirty-two years of coal mine dust exposure as a contributor to claimant's disabling obstructive pulmonary impairment. Decision and Order at 16. The administrative law judge, therefore, found that employer failed to establish that claimant does not suffer from legal pneumoconiosis. *Id.* at 18.

Employer generally asserts that the opinions of Drs. Broudy and Rosenberg are sufficient to establish that claimant does not suffer from legal pneumoconiosis. Employer, however, alleges no specific error in regard to the administrative law judge's consideration of the evidence. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Because the Board is not empowered to reweigh the evidence, or to engage in a *de novo* proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Consequently, we affirm the administrative law judge's finding that employer failed to establish that claimant does not suffer from legal pneumoconiosis.[8] *See* 20 C.F.R. §718.305(d)(1)(i).

In considering whether employer rebutted the Section 411(c)(4) presumption by establishing that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis, the administrative law judge considered the opinions of Drs. Broudy and Rosenberg. The administrative law judge found that neither physician provided sufficient reasoning as to why claimant's respiratory or pulmonary total disability was not caused by pneumoconiosis. Decision and Order at 19. Because employer does not challenge the administrative law judge's specific basis for discrediting the opinions of Drs. Broudy and Rosenberg, we affirm his finding that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii); *Cox*, 791 F.2d at 446-47, 9 BLR at 2-47-48; *Sarf*, 10 BLR at 1-120; *Skrack*, 6 BLR at 1-711.

[8] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). We, therefore, need not address employer's contentions of error regarding the administrative law judge's finding that employer also failed to establish that claimant does not have clinical pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge